5-6-2013

State v. Tinoco Respondent's Brief Dckt. 39659

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JORGE FERREIRA TINOCO, Defendant-Appellant.	)	No. 39659 Canyon Co. Case No. CR-2011-8142

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

NICOLE L. SCHAFER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

ROBYN FYFFE
Nevin, Benjamin, McKay & Bartlett
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature Of The Case

Jorge Ferreira Tinoco appeals from his judgments of conviction for trafficking in methamphetamine and delivery of a controlled substance, contending the district court abused its discretion in denying his motion to dismiss because of an alleged speedy trial violation.

Statement Of Facts And Course Of Proceedings

Tinoco was indicted by the grand jury for the offenses of trafficking in methamphetamine and delivery of a controlled substance. (R., Vol. I, pp.16-17.) Tinoco was arraigned on the indictment on April 15, 2011, and asserted his right to have a speedy trial. (R., Vol. I, pp.24-25.) Jury trial was originally scheduled for July 6, 2011 but reset for August 16, 2011 because the grand jury transcript had not yet been prepared. (R., Vol. I, pp.30-31.) At a hearing on whether Tinoco should be tried with his co-defendant, the district court took the issue under advisement and vacated the trial date and reset the trial for September 20, 2011. (R., Vol. I, pp.60-61.) The court granted ultimately ordered a joint trial. (R., Vol. I, pp.66-74.)

Jury trial commenced on September 20, 2011. (R., Vol. I, pp.82-93 (minutes from day one of the jury trial).) Before commencing the second day of trial, defense counsel for Tinoco's co-defendant made a motion for mistrial because the trial court erred by failing to consider the defense's Batson objection before swearing the jury. (R., Vol. I, pp.94-96.) On day two of the jury trial, counsel for Tinoco joined the motion for mistrial which was ultimately granted by the court. (R., Vol. I, p.96; 9/21/11 Tr., p.34,

Ls.21-22.) A new trial date was set, without objection, for November 1, 2011. (9/21/2011 Tr., p.34, Ls.22-23.)

Tinoco filed a motion to dismiss for an alleged violation of his speedy trial rights on October 24, 2011. (R., Vol. I, pp.129-133.) Following a hearing, the district court denied the motion to dismiss finding there had been "compliance with Idaho Code 19-3501 in that the matter was brought to trial" (10/31/11 Tr., p.29, Ls.11-13), and that there was "good cause" for not holding the trial within six months (10/31/11 Tr., p.36, L.12).

Tinoco was retried and a jury found him guilty of trafficking in methamphetamine and delivery of a controlled substance. (R., Vol. II, pp.215-216.) The court imposed a unified sentence of 23 years with the first 10 years determinate on the trafficking conviction and a concurrent unified sentence of 15 years with the first five years fixed on the delivery charge. (R., Vol. II, pp.228-229.) Tinoco timely appealed. (R., Vol. II, pp.230-234.)

ISSUE

Tinoco states the issue on appeal as:

> Did the district court err in denying Mr. Tinoco's motion to dismiss because the delay in bringing him to trial violated the speedy trial guarantee protected by I.C. § 19-5301, the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Tinoco failed to show any error in the district court's conclusion that there was no violation of Tinoco's statutory or constitutional rights to a speedy trial?

ARGUMENT

Tinoco Has Failed To Show Error In The District Court's Conclusion He Failed To Show A Violation Of His Speedy Trial Rights

A. Introduction

Tinoco's case was brought to trial within the speedy trial limits. (See R., Vol. I, pp.16-18 (filing of superceding indictment on April 7, 2011), pp.24-25 (arraignment on superceding indictment on April 15, 2011), pp.82-93 (September 21, 2011 minutes of first day of jury trial).) The district court declared a mistrial upon Tinoco's motion following the selection and swearing in of a jury and reset the jury trial for November 1, 2011. (R., Vol. I, pp.94-97; 9/21/2011 Tr., p.34, Ls.21-23.) Although there was no objection made to the new trial date, Tinoco filed a motion to dismiss for a speedy trial violation on October 24, 2011. (R., Vol. I, pp.129-133.) The district court concluded that there had been no violation of Tinoco's constitutional or statutory speedy trial rights. (R., Vol. II, pp.142-143; 10/31/2011 Tr., p.29, L.11 – p.34, L.5.) Tinoco argues that the district court erred. (Appellant's brief, pp.4-8.) Application of the law to the facts as found by the district court, however, shows that Tinoco has failed to carry his burden of showing error.

B. Standard Of Review

Whether there was an infringement of a defendant's right to a speedy trial presents a mixed question of law and fact. State v. Clark, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000); State v. Avila, 143 Idaho 849, 852, 153 P.3d 1195, 1198 (Ct. App. 2006). The appellate court defers to the trial court's findings of fact that are supported by substantial and competent evidence, but freely reviews the trial court's application of

the law to the facts found. Avila, 143 Idaho at 852, 153 P.3d at 1198, State v. Davis, 141 Idaho 828, 835, 118 P.3d 160, 167 (Ct. App. 2005).

C. Tinoco's Statutory Speedy Trial Violation Claim Is Without Merit

Tinoco was entitled to dismissal without prejudice if he was not tried within six months of his arraignment on the superceding indictment and there was not "good cause" for delay. I.C. §§ 19-3501(3), 19-3506. Tinoco was in fact brought to trial within the six months of his arraignment. Tinoco's jury trial commenced on September 20, 2011 with a jury sworn before the district court granted a defense motion for mistrial on September 21. This was over three weeks before Tinoco's speedy trial ran. Tinoco argues that "the district court's error in misleading counsel regarding the timing of the *Batson* challenge does not justify setting the trial outside the speedy trial period." (Appellant's brief, p.7.) Tinoco argues that because there was no good cause for the shown for the delay in trial, "the district court erred in denying the motion to dismiss regardless of whether the additional Barker factors also weigh towards dismissal." (Id.)

The statute does not require a trial must go to verdict within six months of arraignment. Interpreting the statute to contemplate a retrial after a mistrial must be held within six months of arraignment is outside the plain meaning of the text of the statute. Because Tinoco was brought to trial within the statutory six months, there was no speedy trial violation.

D. Tinoco Has Failed To Show Error In The District Court's Conclusion He Failed To Show A Violation Of His Constitutional Speedy Trial Rights

Even if Tinoco's trial date following the mistrial declared in his first trial constituted a delay of his speedy trial, there was good cause shown for such delay.

"Both the Sixth Amendment to the United States Constitution and Article 1, § 13 of the Idaho Constitution guarantee to criminal defendants the right to speedy trial." State v. Lopez, 144 Idaho 349, 352, 160 P.3d 1284, 1287 (Ct. App. 2007). When analyzing claims of speedy trial violations under the state and federal constitutions, the Idaho appellate courts utilize the four-part balancing test set forth by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). State v. Young, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001); Lopez, 144 Idaho at 352, 160 P.3d at 1288; State v. Avila, 143 Idaho 849, 853, 153 P.3d 1195, 1199 (Ct. App. 2006). The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to speedy trial; and (4) the prejudice occasioned by the delay. Barker, 407 U.S. at 530. Application of this legal standard to the facts found by the district court shows that Tinoco's claim of error fails.

1. The Length Of The Delay Is Neither Sufficient To Trigger Balancing Nor Does It Weigh In Tinoco's Favor

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. For purposes of the Sixth Amendment, "the period of delay is measured from the date there is 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge.'" Lopez, 144 Idaho at 352, 160 P.3d at 1287 (citing United States v. Marion, 404 U.S. 307, 320 (1971); Young, 136 Idaho at 117, 29 P.3d at 953.) "Similarly, under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first." Lopez,

144 Idaho at 352, 160 P.3d at 1287 (citations omitted). Once the balancing test is triggered, the length of delay also becomes a factor in and of itself. Avila, 143 Idaho at 853, 153 P.3d at 1199.

The delay in this case did not trigger any presumption of prejudice. In Doggett v. United States, 505 U.S. 647, 652 (1992), the Supreme Court of the United States held that this factor required a "double enquiry." The first enquiry is whether "the interval between accusation and trial" had become "presumptively prejudicial." Id. This part of the enquiry is necessary because a defendant may not claim that the government has denied him of a speedy trial if the government "has, in fact, prosecuted his case with customary promptness." Id. The Court stated in a footnote that pretrial delay therefore does not generally trigger speedy trial enquiry until it "at least ... approaches one year." Id. at 652 n.1. Here the time between arraignment on the indictment trial was less than seven months, a period of time insufficient to trigger the presumption of prejudice.

Even if the threshold enquiry had been met here, Tinoco has failed to show that bringing him to trial in less than seven months weighs in favor of finding a violation of speedy trial rights. Bringing Tinoco to trial less than seven months after his arraignment simply does create much, if any, presumption of prejudice.

2. The Granting Of A Mistrial Constituted A Valid Reason For The Brief Delay

Implicit in the standards applicable to claims of constitutional speedy trial violations is the recognition that "pretrial delay is often both inevitable and wholly justifiable." Avila, 143 Idaho at 853, 153 P.3d at 1199 (citing Doggett, 505 U.S. at 656); State v. Davis, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005) (same). For that

reason, different weights are assigned to different reasons for the delay. Barker, 407 U.S. at 531. As explained by the Supreme Court:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531 (footnote omitted). In this case the 41 day delay engendered by granting of a mistrial was appropriate because it was based a trial error.

The district court set forth the undisputed facts relevant to the speedy trial issue as follows:

> As a factual basis, generally, the Court finds that on April 15th, 2011, the defendant was – and I'm referring to Mr. Tinoco, because Mr. Tinoco's the one who has stood on his speedy trial rights in this base. But he was arraigned on two felony drug offenses. He was charged by superseding [sic] indictment in this case. Count 1 charges him with trafficking in methamphetamine or amphetamine. Count 2 charged him with delivery of a controlled substance. To this charge, Mr. Tinoco plead [sic] not guilty, and specifically asserted his rights to have a speedy trial.
>
> The trial was originally scheduled for August 16th, 2011. That trial was continued and reset within the speedy trial period. Trial setting, again, September 21st, 2011 are the reason, at least obvious on the record, for resetting the trials, because I believe when these matters first came to trial, they were not consolidated, and there were some issues that arose on that date. Then there was a motion to consolidate on or about that date. And ultimately, this Court decided to consolidate, and then subsequently denied a motion to sever the trials.
>
> The motion to consolidate was on or about July 26th, 2011. The August 16th, 2011 trial was vacated and a new jury trial was scheduled for September 20th; is that – am I – I've been saying September 20th first [sic], but is it September 20th? I guess the trial was commenced on September 20th, 2011. So the record needs to be corrected to reflect it was the September 20th, 2011 trial. The status conference was September 19th, 2011. So I'll correct the record to reflect the jury trial at issue was

> scheduled to commence September 20th, 2011, and that is the date that the issues of the multiple Batson – the Batson challenge arose.
>
> Judge Morfitt ruled that the Batson challenge was not properly raised prior to the jury being sworn, but accepted responsibility as the Court for, perhaps, creating uncertainty or confusion, acknowledging that the attorneys advised him of their Batson challenge off the record, and that he had, basically, indicated he wanted to get the jury taken care of, or something to that effect, which he went ahead and seated the jury, and excused the other jurors while the attorneys were still waiting, I believe, to address the Batson issues.
>
> Thereafter, Mr. Sisson [counsel for Tinoco's co-defendant] made a motion for a mistrial, and Mr. Briggs [counsel for Tinoco] joined in that motion for a mistrial. Court acknowledged it potentially misled defense counsel outside the courtroom, and a a result of that, declared a mistrial accepting responsibility for that problem. The Court set a new trial date for November 1st, 2011. The record, as far as my review, indicates the – neither the Court nor either attorney indicated on the record at that time that the November 1st, 2011 date was not within the speedy trial date, which was October 12th, 2011, according to this Court's calculation. The new trial setting, which is for tomorrow, November 1st, 2011, exceeds the – or goes beyond the original set speedy trial date of October 12th, 2011, appears 18 days.

(10/31/11 Tr., p.24, L.23 – p.27, L.14.) Regarding the mistrial, the district court concluded: "I do not find it was delay caused by the State or Defense in this case, but, in fact, the Court." (10/31/11 Tr., p.32, Ls.9-11.) These findings more than support the district court's determination that the mistrial was based on a valid reason, and therefore any attendant delay was also reasonable.

3. Although Tinoco Asserted His Constitutional Speedy Trial Rights At The Time Of His Arraignment, He Did Not Object To The District Court's Trial Setting Following The Granting Of His Motion For A Mistrial

The third factor in the Barker analysis is whether and how the defendant asserted his constitutional right to a speedy trial. A defendant's assertion of his right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of

the right." Barker, 407 U.S. at 531-32; Davis, 141 Idaho at 839, 118 P.3d at 171. "Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Davis, 141 Idaho at 839, 118 P.3d at 171. Although Tinoco asserted his speedy trial rights upon his arraignment on the indictment, he did not object to the mistrial or the trial setting in the new trial. Tinoco did not complain of a potential speedy trial violation until he filed a motion to dismiss on October 24, 2011, 33 days after the mistrial and scheduling of the new trial. (R. Vol. I, pp.129-133.) As the district court found, "when balanced and compared to the reason for the continued trial and the time delay involved, . . . it's [not] an overriding factor either way." (10/31/11 Tr., p.32, L.24 – p.33, L.2.) Thus, this factor does not weigh heavily in Tinoco's favor.

4. Tinoco Failed To Establish That He Was Unfairly Prejudiced By The Delay

The final and most important factor in the Barker analysis is the nature and extent of any prejudice suffered by the defendant as a result of the delay. Barker, 407 U.S. at 532; Lopez, 144 Idaho at 354, 160 P.3d at 1289; Davis, 141 Idaho at 840, 118 P.3d at 172. As explained by the Idaho Supreme Court:

> Prejudice is to be assessed in light of the interests of defendants which the right to a speedy trial is designed to protect. Those interests are (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

Young, 136 Idaho at 118, 29 P.3d at 954 (citing Barker, 407 U.S. at 532). Accord Lopez, 144 Idaho at 354-55, 160 P.3d at 1289-90; Avila, 143 Idaho at 854, 153 P.3d at 1200; Davis, 141 Idaho at 840, 118 P.3d at 172. "The third of these is the most significant because a hindrance to adequate preparation of the defense 'skews the fairness of the entire system.'" Lopez, 144 Idaho at 355, 160 P.3d at 1290 (citing

Barker, 407 U.S. at 532; State v. Hernandez, 133 Idaho 576, 583, 990 P.2d 742, 749 (Ct. App. 1999)).

Although Tinoco was in custody the entire time the charges were pending, he made no claim below that the delay from his arrest in any way prejudiced his ability to defend himself at trial except to assert at the motion hearing that the state's case got stronger with the recently completed fingerprint analysis on evidence pointing to the culpability of Tinoco. (10/31/2011 Tr., p.23, Ls.5-17.) There is no assertion that the trial was in way delayed to obtain such forensic results, just that the testing only became complete after the mistrial. (10/31/2011 Tr., p.34, Ls.10-19.) As noted by the district court, this is not the "kind of prejudice that was contemplated in the cases dealing with this issue." (10/31/2011 Tr., p.34, Ls.3-5.) The only relevant prejudice found by the district court was pre-trial incarceration. (10/31/2011 Tr., p.33, Ls.3-18.) Pre-trial incarceration, alone, does not cause this factor to weigh in Tinoco's favor.

5. A Balancing Of The *Barker* Factors Weighs Against A Finding Of A Speedy Trial Violation

The four Barker factors, together with any other relevant circumstances, must be balanced and weighed to determine whether an individual's right to a speedy trial was violated. Barker, 407 U.S. at 533. In this case the time from arraignment to trial was relatively short. It was not enough to trigger speedy trial analysis. Even if enough to act as a trigger, it was only barely enough. That the delay was minimal weighs heavily in favor of the district court's ruling. The reason for delay also strongly supports the determination that there was no speedy trial violation because the only delay complained of was due to granting of Tinoco's motion for a mistrial. The third factor

also does not weigh heavily in Tinoco's favor because, although Tinoco did assert his right early on, he failed to object to the new trial date. Finally, there was minimal prejudice. This final factor ultimately weighs in favor of the district court's ruling. Because these factors weigh against a finding of a speedy trial violation, Tinoco has failed to show error in the denial of his motion to dismiss.

CONCLUSION

The state respectfully requests this Court to affirm Tinoco's judgments of conviction for trafficking in methamphetamine and delivery of a controlled substance.

DATED this 6th day of May, 2013.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of May 2013 caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Robyn Fyffe
Nevin, Benjamin, McKay & Bartlett
303 W. Bannock
P.O. Box 2772
Boise, Idaho 83701

NICOLE L. SCHAFER
Deputy Attorney General

NLS/rn